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# Supreme Court of the United States

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**No. 74.**

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LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

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## PETITIONER'S ANSWER TO RESPONDENT'S BRIEF ON FINAL HEARING.

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## PETITIONER'S ANSWER TO RESPONDENT'S BRIEF ON FINAL HEARING.

I.

**Is the Decision of the Circuit Court of Appeals in Conflict with the Decision of the Kansas City Court of Appeals in Stoner v. New York Life Insurance Co., 90 S. W. 2d 784, and Stoner v. New York Life Insurance Co., 232 Mo. App. 1048, 114 S. W. 2d 167?**

Petitioner asserts that it is, and respondent asserts it is not. Let us see.

(a) In both cases decided by the Kansas City Court of Appeals the Insurance Company insisted that the plaintiff had not introduced substantial evidence to sustain a finding by a jury (or a court sitting as a jury) that he was totally disabled; that therefore defendant was entitled to a directed verdict on its demurrer to the evidence, and consequently any error in the instructions was harmless (See 90 S. W. 2d l. c. 790; 114 S. W. 2d l. c. 168). Since errors in instructions are harmless if the defendant is entitled to a directed verdict (*Allen* v. *Larabee Flour Mills*

*Corp.*, 328 Mo. 226; *Shelton* v. *Wolf Cheese Co.*, (Mo. Sup.) 93 S. W. 2d 947; *Barr* v. *Mo. Pac. R. R. Co.*, (Mo. Sup.) 37 S. W. 2d 927; *Bello* v. *Stuever*, (Mo. Sup.) 44 S. W. 2d 619; *Chappee* v. *Lubrite Refining Co.*, (Mo. Sup.) 85 S. W. 2d 1034; *Trainer* v. *Spahlerite Mining Co.*, 243 Mo. 359), it was necessary for the Kansas City Court of Appeals to and it did determine whether the evidence submitted by the plaintiff, if true, was sufficient to sustain a finding by the trier of the facts that plaintiff was totally disabled within the meaning of the policies, under the rule of law stated by the court (and in many other Missouri cases) as to what constitutes "total disability."

In both cases the Kansas City Court of Appeals held, as a matter of law, that the evidence was sufficient to sustain a finding that the plaintiff was totally disabled. Of course the Appellate Court did not hold that the trier of the fact had to *believe* the evidence introduced by the plaintiff and the verdict *had* to be for him.

(b) In the case at bar the parties waived a jury (Record reprint page 19) and the case was tried by the court sitting as a jury. This is an action for a declaratory judgment. Respondent alleged that there was this existing controversy between the parties: Respondent was contending it was not liable to petitioner for disability benefits from May 29, 1936, to January 7, 1938, because he was not totally disabled during that period. Petitioner was contending he was totally disabled. The sole controversy the court was asked to determine by its finding and judgment was this: Was Lewis K. Stoner totally disabled from May 29, 1936, to January 7, 1938? If the case had been submitted to a jury the only verdict required of it would have been that Mr. Stoner was or was not totally disabled during that period. That was the ultimate fact to be determined. When a jury was waived that was the ultimate finding required of the court. The court did find that ultimate fact, as follows:

> "From May 29, 1936, until January 7, 1938, the defendant (petitioner) was totally and presumably permanently disabled by reason of the injury received by him June 29, 1931" (Record reprint p. 100).

The decision of the Circuit Court of Appeals is contrary to both of the decisions of the Kansas City Court of Appeals. On the identical evidence, the latter court held that the testimony was sufficient to sustain a finding that the plaintiff was totally disabled while the former court held that the testimony *conclusively* established that he was not totally disabled. The Circuit Court of Appeals did not rule that the Kansas City Court of Appeals had not held that the evidence was sufficient to sustain the finding, but put its decision upon the ground that:

> "We are not bound to follow the decisions and reasonings of the intermediate appellate courts of Missouri" (Record reprint p. 112),

and the court were

> "constrained to find that the evidence conclusively establishes that the insured not only can but does substantially perform all the substantial and material acts necessary to the prosecution of the business in which the insured is engaged and that such business returns a profit" (Record reprint p. 113).

The Circuit Court of Appeals made its own finding of facts as if it were the trier of the facts. That was not its province. It had the right only to determine whether, under the law of Missouri, there was substantial evidence to support the finding of fact made by the District Court. If so, that finding was conclusive (*State Farm Mutual Auto Ins. Co.* v. *Coghran*, 303 U. S. 485, 82 L. Ed. 970).

(c) In making its finding that petitioner was "engaged in a business for profit" and therefore he was not totally disabled, the Circuit Court of Appeals again refused to follow the decision of the Kansas City Court of Appeals in this respect:

In the case at bar the evidence introduced by respondent showed that the applications for the policies stated that petitioner's occupation was a farmer operating and managing a farm. He owned one farm and rented an adjacent farm and operated both. He had only a grammar school education obtained in a country school and he was not qualified by education or experience to engage in any other occupation or profession; in fact he knew nothing of any business other than farming (Record reprint pp. 24-25). He operated the farm with his own labor and one, and sometimes two, farm hands who assisted in the work. Prior to his injury he plowed and cultivated the ground, planted crops and cultivated, harvested and fed or hauled them to market. He himself selected, bought, fed, attended to, hauled and sold livestock. He made repairs, did the chores and performed the physical work required to operate the farm. He directed his hired men what to do and personally supervised their work. As a result of his injury he could not do *any physical* work. Mentally he was not affected. He could and did continue to direct his hired men what to do, although he could not personally supervise their work. After he was injured, pursuant to his instructions, the hired men did all the physical work. The petitioner employed commission men to buy stock which they, not he, selected and which the hired men fed and which were hauled to market by them and sold by commission men when petitioner directed.

Because he *directed* what was done on the farm the Circuit Court of Appeals held that though he could not perform the physical work of a farmer, he was carrying on a business and therefore he was not totally disabled. In other words, the court below held that directing the operation of a farm was a business in itself, separate and distinct from petitioner's business as a farmer, and not merely a part of the duties of one occupation, that of a farmer managing and operating his own farm. In so doing the court below upheld the contention of respondent

which the Kansas City Court of Appeals expressly denied. We repeat, the case at bar was tried on the identical facts shown in the two Stoner cases decided by the Kansas City Court of Appeals. In fact, the respondent (by agreement) simply introduced the record in one of those cases (Record reprint pp. 19, 24). In the first Stoner case (90 S. W. 2d 784) the theory of the insurance company was that though Mr. Stoner could not perform the physical work he was required to do as a farmer, he was carrying on a business because he could and did direct the operation of the farm. On that theory the insurance company asked and the trial court gave an instruction to the jury which treated the management and operation of the farms by direction of Mr. Stoner as a business separate and distinct from his business as a farmer, and told the jury that if he could perform his managerial duties he was not totally disabled. The Kansas City Court of Appeals held the instruction was erroneous because in doing the physical work and directing the operations on the farm, the petitioner was engaged in but *one* occupation, that of a farmer managing and operating his farm, and the instruction singled out certain duties of that one occupation and told the jury that if the petitioner was able to perform those duties he was not totally disabled. For the convenience of the court, we quote at length from the decision. The court said:

> "It is contended first by plaintiff that error was committed by the trial court in giving instructions L, M, N, and O in behalf of defendant on the trial. He complains that each singles out from among the duties of plaintiff's occupation as a farmer in the actual cultivation of his farms one of the duties of such occupation; that each advised the jury that, as a matter of law, plaintiff was not totally disabled and could not recover if, since his injury, he could perform substantially his duties as the owner and operator of such farms or as a manager of such, without regard to whether he could do the work and labor required of him as a farmer in his actual farming operations;

that such instructions ignored the plaintiff's real occupation as that of farmer or that of farming, and treated his occupation as that of a farm owner and farm operator or farm owner and farm manager separately and apart from his occupation as a farmer performing actual farm work and labor and advised the jury that, if he could perform the duties of such owner and operator or of such owner and manager he could perform the duties of his occupation under the policies; that, in so doing, such instructions were misleading and erroneous; and that such instructions should have submitted plaintiff's ability or inability to perform substantially his duties in his occupation as a farmer." * * *

"It is clear from the answers in each of the applications for the policies sued on that plaintiff gave his occupation as that of a farmer, farming, operating, and managing farms of which he was the owner, and that, as such, he was insured by the defendant under the policies sued on.

"The plaintiff was living upon, operating, and managing his own farms—that is, farms owned or rented by him of which he was the proprietor—and was doing the actual farm work and farm labor required in the actual farming of them. In so doing, he came within the definition of a farmer as declared by this court in the case of *Foglesong* v. *Modern Brotherhood of America, supra,* where, in speaking of the plaintiff in that case, it was said, 'He was a farmer in the sense the term is usually understood to express; that is, one who directs the business of a farm, and works at farm labor.' The instant case, in many of its aspects, is very similar to the Foglesong Case.

"Plaintiff's entire duties were not limited to those of owner and operator or those as owner and manager, but extended to and embraced his duties as a farmer engaged in the actual farming operations on said farms and the farming business conducted thereon, which included farm work and labor.

"To say of one that he 'owns and operates and manages a farm,' however, does not necessarily imply that he does the work and labor thereon in the actual farming thereof. Such labor may be done by

himself or through others. *Where he both directs the operations on said farm and does farm labor thereon, both activities are embraced within his occupation as a 'farmer.'*

"The instructions were therefore, under the facts in the record, erroneous. They not only commented on the evidence, but they were calculated to mislead the jury as to the real issues involved, which concerned plaintiff's ability or inability as a farmer substantially to perform the duties of his occupation as a farmer during the time for which the benefits herein are claimed by him. They should have submitted his ability substantially to perform the duties of his occupation as a farmer and not merely his ability to perform his duties as the operator and manager of his farms. It is shown by the evidence that, at the time of his injuries, he was doing such necessary farm labor as was required in the operation and management of his farms and in conducting the business of farming thereon and was actually participating in the doing of such labor at such time; and it is for alleged inability to perform such acts substantiallly in the prosecution of his occupation after his injury, whereby he was rendered unable substantially to perform such, that the benefits herein are sought.

"Under the particular facts appearing in the record, such instructions were further erroneous in directing the jury that, if the plaintiff was able to perform his duties as the operator and the manager of his farms, then he was not totally disabled. They should have required the jury to find that he was able substantially to perform the duties of his occupation as a farmer in the normal, natural, and customary way and in such a way as to earn a livelihood. There is evidence in the record which may not be ignored which tends to show that, while plaintiff did in a way or after a fashion do some of the acts required of him as the operator and manager of his farms in directing the activities thereon through others, yet he did so at great inconvenience and pain and distress to himself by reason of his injury and his physical condition consequent thereon. There is no evidence that he did any of the acts of manual labor required in the actual farming operations on said farms." * * *

"Plaintiff complains of defendant's instruction J. There is no evidence in the record tending to show that the plaintiff had engaged in the business, work, or occupation of operator or manager of a farm for profit other than in connection with the farm or farms which he was engaged in operating and farming as owner at the time the policies in suit were issued to him. His operation and management of such farms were as the owner thereof and were connected with his farming operations as a farmer thereon. At the time that the policies in suit were issued to him and at the time he was injured, he was engaged in directing the business of such farms and in doing the actual farm labor thereon in the operation thereof; and, he being so engaged, his occupation was that of a farmer. *Foglesong* v. *Modern Brotherhood of America, supra.* The policies in suit insured him against total disability from the performance of his duties in such occupation (that is, in his occupation as farmer) *and not from disability merely to perform the duties of an operator and manager of farms as a distinct and separate occupation.* There is no evidence that he did so engage. Under the facts in the record, to hold that he was engaged in the business of managing and operating farms for profit or to forbid him a recovery herein for the reason that he was unable as a result of his injuries to perform the necessary acts of farm labor required of him in the operation of his farms, although he continued in a way to operate and manage said farms and to direct the business thereon through hired agencies and help, would be to defeat the very object and purpose of the contract of insurance, which was to provide the payment of benefits to him during his disability to compensate him for his loss of time and effort, and would be to render such contract a nullity. This will not be done. *Wall* v. *Continental Casualty Company, supra; Foglesong* v. *Modern Brotherhood of America, supra.* The occupation in which plaintiff was insured is the occupation which plaintiff was following at the time that the policies were issued and at the time that he was injured and became disabled" (*Stoner* v. *N. Y. Life Ins. Co.*, 90 S. W. 784, l. c. 794 *et seq.*) (Italics supplied).

The Circuit Court of Appeals simply ignored the decision of the Kansas City Court of Appeals that the petitioner, in doing the physical work and directing the operation of the farm he owned and the farm he rented, was engaged in *one* occupation or business, that of a farmer operating and managing his own farm. The court below had no right to do that if the decision of the Kansas City Court of Appeals is binding. Its ruling is not only in conflict with the decisions of the Kansas City Court of Appeals in the Stoner cases but also with the numerous cases cited in our original brief.

If, as a result of his injury, Mr. Stoner had lost one foot and one hand, he could have done everything that he did do which the court below held constituted carrying on business; and, if the ruling below is right, he would not be entitled to recover disability benefits because he would not be totally disabled. But the policy expressly provides that the loss "of one foot and one hand shall constitute total disability for life" (Record reprint p. 22). The parties never contemplated, and the law of Missouri does not contemplate, that to be totally disabled, an insured, whose occupation is that of a farmer operating and managing his own farm, must be both mentally and physically disabled to such an extent that he is absolutely helpless. If he cannot perform substantially the duties of his occupation in the customary and usual manner in which he performed them before he was injured, under all the Missouri cases he is totally disabled.

(d) The court below, and the respondent in its brief here quote the observations of the District Court in his memorandum opinion regarding the physical condition of the petitioner, and treat it (or at least respondent's counsel treat it) as the *finding of fact* made by the trial court. A statement as to what is one's physical condition is one thing; a finding as to what extent that physical condition affects ability to work is quite another. The memorandum opinion (which is not a part of the record) discloses that the District Court believed the evidence did

not show the petitioner was able to engage in any business. It pictured petitioner's physical condition as the court saw it. The finding of the trial court as to the extent of petitioner's disability as the result of his physical condition is found in the separate *finding of fact* made by the trial court to which we have called attention. The trier of the fact found that the petitioner's disability was total. In the court below respondent did not claim that the District Court had not so found. Its contention was that there was no evidence to support that finding.

(e) Respondent calls attention to the fact that in addition to the provision defining total and permanent disability which entitled the appellee to disability benefits and a waiver of premium, all of the policies in question contained this further provision:

> "Before making any income payment or waiving any premium the company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if the insured performs any work or follows any occupation or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived" (Respondent's brief pp. 20-21).

Respondent contends:

> "In this case we submit that the language is clear to the effect that if the insured actually did any work, engaged in any business or occupation for profit, that he is not entitled to further income payments. His testimony is equally clear that during the time in question he did actually engage in an occupation or business for profit. It is submitted that Petitioner has brought himself within the above quoted provision of this contract and relieved the Respondent of the duty to make any further payments" (Respondent's Brief p. 22).

But the respondent admits that this question was raised and passed upon by the Kansas City Court of Ap-

peals in *Stoner* v. *New York Life Ins. Co.*, 90 S. W. 2d 794, where the court held:

> "In other words, the insuring clause gives the right to benefits when insured is disabled so as to prevent the doing of certain things. The last clause but negatives his right to benefits when he is not so prevented, but when he is able so to engage and does so engage, they are correlative clauses. Both are to be given the same construction."

It would be strange indeed if identical words used in two clauses of an insurance policy, one almost immediately following the other, meant one thing in one clause and another thing in the other clause. The two provisions are correlative as the Kansas City Court of Appeals held, and that construction of the contract is binding.

Respondent says:

> "It is true that an application for certiorari was denied in this case by the Supreme Court. However, denial of the application does not denote affirmance of the opinion. The application was made in order to preserve the objections to this ruling so that it might not become the law of the case. Certiorari, except in exceptional cases, will not lie to the Supreme Court of Missouri until final judgment is entered. Since there was no final judgment, and since no identical case had been passed upon by the Supreme Court, there was ample ground for the denial of the writ without an affirmance of the opinion" (Respondent's Brief p. 23).

As we pointed out in our original brief, respondent applied to the Supreme Court of Missouri for a writ of certiorari to quash the opinion of the Kansas City Court of Appeals on the ground that the provisions of the policy were clear and unambiguous, and in construing those provisions the opinion of the Court of Appeals was in conflict with prior decisions of the Supreme Court holding that a contract which was unambiguous was not open to construction. The Supreme Court denied the writ.

Following its custom in such cases, the Supreme Court filed no opinion. Of course in denying the writ, the Supreme Court did not rule that the opinion of the Kansas City Court of Appeals on the *merits* was right or wrong. The latter court is a court of last resort. Right or wrong, its opinions are binding upon the Supreme Court. To permit that court to determine whether the opinion of the Appellate Court was right or wrong on the merits would be, in effect, to permit an appeal from the Appellate Court when under the laws of Missouri an appeal is not allowed. The Supreme Court, on certiorari, may say only that the opinion of the Court of Appeals (right or wrong) does or does not conflict with a prior controlling decision of that court. About such a controlling opinion, right or wrong, the opinion of the Court of Appeals is final. When we say that the refusal of the Supreme Court to grant certiorari was a ruling by that court that the decision of the Kansas City Court of Appeals was "right," we mean to say that, by refusing the writ, the Supreme Court held the ruling of the Kansas City Court of Appeals *that the policies were ambiguous and open to construction* was right; for if the policies are unambiguous the ruling of the Appellate Court would have conflicted with prior decisions of the Supreme Court holding unambiguous contracts are not open to construction, and the writ would have been granted. For that reason we say that the Supreme Court of Missouri, by denying certiorari, held that the policies are ambiguous and open to construction, which is directly contrary to the opinion of the Circuit Court of Appeals and the contention of respondent.

It is naively suggested by respondent's counsel that the Supreme Court may have refused certiorari because the judgment of the Kansas City Court of Appeals was not a final judgment, since it reversed and remanded the case for another trial (Respondent's Brief pp. 37-38). The decision and opinion of the Court of Appeals is final, no matter whether the cause is affirmed or reversed and remanded. It would be strange indeed, if the Supreme

Court, on certiorari, could quash an opinion of the appellate court which conflicted with its own, only when the appellate court rendered an opinion affirming a judgment of a trial court.

II.

**The Opinion of the Kansas City Court of Appeals in the Stoner Case Does Not Conflict with the Opinion of the Springfield Court of Appeals in Jones v. Metropolitan Life Insurance Company, 130 S. W. 2d 967, or the Opinion of the St. Louis Court of Appeals in Smith v. Metropolitan Life Insurance Company, 108 S. W. 2d 995, or Eden v. Metropolitan Insurance Company, 138 S. W. 2d 745.**

A mere glance at these cases discloses that the evidence on the part of the plaintiff in each case showed that he continued to perform all of the duties of his occupation just as he had always done during the term of his employment. In the Smith case, after laying down the same rule of law stated in the Stoner cases, the court held that a demurrer to the evidence should have been sustained because:

> "Ignoring defendant's evidence and taking into consideration only the evidence adduced on behalf of plaintiff as well as plaintiff's own testimony, it clearly appears that plaintiff worked at his usual employment in the usual and customary way, not only prior to March 31, 1932, but also during April, May and the early part of June, 1932, after the policy sued on was canceled. It appears without dispute that he was not only able to do this but that he worked over time both before and after the date of the cancellation of the policy sued on" (108 S. W. 2d l. c. 998).

In the Jones case the plaintiff was precluded from recovering for the same reason. In the Eden case the court laid down the same rule of law announced in the Stoner cases as to what constitutes total disability but denied a recovery because:

"Not only did plaintiff's own evidence show that during his employment by the Lead Company he was physically able to perform in the usual and customary way all the material acts of the job assigned to him, but that, indeed he was so proficient at his work, and was so able to do more than the minimum work called for by the basic rate of pay, that he regularly earned substantial bonuses for himself, and likewise made it possible for regular bonuses to be earned by those of his fellow employes who hauled away the cars he filled."

## III.

### The Kansas City Court of Appeals Is a Court of Last Resort in Missouri.

It is true that appeals from Circuit Courts in certain counties of the state run to that court. Appeals from certain other counties run to the St. Louis Court of Appeals and from certain other counties to the Springfield Court of Appeals. The county in which the Circuit Court sits determines to which court an appeal shall go. But when any case reaches any Court of Appeals, its decision is statewide in its application. It is true that the Supreme Court has control over the courts of appeal in that it may mandamus an appellate court to assume jurisdiction or prohibit it from exceeding its jurisdiction, and it may quash the opinion of any court of appeal on certiorari if it conflicts with any prior controlling decision of the Supreme Court. If there be no conflict, the decision of any court of appeal in any case within its jurisdiction is final. It is a court of last resort. The cases cited in our original brief decided by the Supreme Court of Missouri so hold.

There are two divisions of the Supreme Court of Missouri. Each is a court of last resort. It infrequently happens that the decision of one division is in conflict with that of the other. In such instances the practice is, after opinion in division, to send the case to the court *en banc* composed of both divisions, and that court settles

the conflict. But because that may be done, or because this court in a proper case may overrule a decision of either division of the Supreme Court is no reason for saying that court is not a court of last resort.

What is the law of the state? The answer, as stated in 15 Corpus Juris, page 922, Section 309, is this:

> "The decision of an intermediate appellate court is the law of the state or jurisdiction until such decision is reversed or overruled by the court of last resort, and the duty of a lower court to follow such decision is not affected by the fact that it is contrary to the decisions of the court of last resort of a sister state on the same question. But a decision of an appellate court, not of last resort, which is not in accord with the decisions of the court of last resort, is not authoritative.
>
> "Where there are several appellate courts or divisions with co-ordinate jurisdiction, an inferior court in one division or district should follow the decisions of the appellate court of another division or district as to a matter which has not been passed upon by its own appellate court; but in case there is a conflict between the decisions of such courts or divisions, an inferior court should follow the decisions of its own appellate court."

It certainly is true, as the Supreme Court of Missouri said in *Poe* v. *Illinois Cent. R. Co.*, 339 Mo. 1025, cited by respondent, that where the Supreme Court *has* spoken, its decision is binding on all the courts of the state. But it is equally true that where the Supreme Court has *not* spoken, the decisions of the state courts of appeals declare the law of the state. It is inconceivable that respondent is correct in saying: "Until the Supreme Court has spoken, there is no law of the state."

If so, there is no law of the state of Missouri on thousands of questions settled by repeated decisions of its courts of appeals in cases within their jurisdiction and on which there is no utterance of the Supreme Court. If so, there is no law of this state as to what is meant

by "total disability" within the meaning of an insurance policy (assuming the Supreme Court has not decided the question), though all of the courts of appeal have with unanimity decided the question in a multitude of cases extending over a period of nearly a half a century, and those decisions (until the Supreme Court declares to the contrary) are binding on every *nisi prius* court in the state and every litigant who applies to them for judgment.

Since it is obvious that the decision of the Circuit Court of Appeals was based on the erroneous notion that that court was not bound by the decisions in the Stoner cases or any of the numerous other cases decided by the Courts of Appeal of Missouri, its judgment should be reversed, even if it were true, as that court *erroneously* said, that the Supreme Court of Missouri has not declared the law in the cases decided by it cited in our original brief.

Respectfully submitted,

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